

University Park Living Center and Local 79, Service Employees International Union, AFL-CIO. Case 7-CA-42066

August 6, 1999

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS LIEBMAN
AND BRAME

Pursuant to a charge filed on May 25, 1999, the General Counsel of the National Labor Relations Board issued a complaint on June 2, 1999, alleging that the Respondent has violated Section 8(a)(5) and (1) of the National Labor Relations Act by refusing the Union's request to bargain following the Union's certification in Case 7-RC-21477. (Official notice is taken of the "record" in the representation proceeding as defined in the Board's Rules and Regulations, Secs. 102.68 and 102.69(g); *Frontier Hotel*, 265 NLRB 343 (1982).) The Respondent filed an answer admitting in part and denying in part the allegations in the complaint.

On June 28, 1999, the General Counsel filed a Motion for Summary Judgment. On June 30, 1999, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed a response.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

In its answer the Respondent admits its refusal to bargain, but attacks the validity of the certification on the basis of its contention, rejected in the representation proceeding, that the certified unit is inappropriate because the registered nurses and the licensed practical nurses who constitute the unit are supervisors within the meaning of the Act.

All representation issues raised by the Respondent were or could have been litigated in the prior representation proceeding. The Respondent does not offer to adduce at a hearing any newly discovered and previously unavailable evidence, nor does it allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding. We therefore find that the Respondent has not raised any representation issue that is properly litigable in this unfair labor practice proceeding. See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941). Accordingly, we grant the Motion for Summary Judgment.¹

On the entire record, the Board makes the following

¹ The Respondent's request to dismiss the complaint is therefore denied.

FINDINGS OF FACT

I. JURISDICTION

At all times, the Respondent, a corporation, with an office and place of business in Muskegon, Michigan, has been engaged in the operation of a nursing home.

During the calendar year ending December 31, 1998, the Respondent, in the conduct of its business operations, derived gross revenues in excess of \$200,000, and purchased and caused to be shipped to its Muskegon, Michigan facility goods and materials valued in excess of \$50,000 directly from suppliers located outside the State of Michigan.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Certification

Following the election held March 19, 1999, the Union was certified on March 29, 1999, as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

All full-time and regular part-time unit managers employed by the Employer at its facility located at 570 South Harvey Street, Muskegon, Michigan; but excluding medical records secretary, central supply purchaser, staff development, clinical resource manager, aging service referral coordinator, clinical care coordinators, service and maintenance employees, guards and supervisors as defined in the Act.

The Union continues to be the exclusive representative under Section 9(a) of the Act.

B. Refusal to Bargain

By letter to the Union dated May 19, 1999, the Respondent refused to recognize and bargain with the Union because it disagreed with the Board's finding that its registered nurses and licensed practical nurses who had the title of "unit managers" were not supervisors. The Respondent's letter advised the Union that "[i]t is University Park's intent to request the Sixth Circuit Court of Appeals to review the NLRB's decision. University Park is hereby informing you of its refusal to recognize SEIU Local 79 as the collective bargaining representative of its Unit Managers. Therefore, University Park will not meet with SEIU Local 79 representatives to negotiate a collective bargaining agreement."² We find that this refusal

² The complaint alleges that on about April 29, 1999, the Union, in writing, requested the Respondent to recognize and bargain with it. The Respondent's answer denies this allegation. The General Counsel has not attached a copy of the Union's letter to his Motion for Summary Judgment. We find, however, that the Respondent's denial raises no issue warranting a hearing in this proceeding. The Respondent's answer admits the complaint allegation that it has refused to recognize

constitutes an unlawful refusal to bargain in violation of Section 8(a)(5) and (1) of the Act.

CONCLUSION OF LAW

By refusing on and after May 19, 1999, to bargain with the Union as the exclusive collective-bargaining representative of employees in the appropriate unit, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to bargain on request with the Union and, if an understanding is reached, to embody the understanding in a signed agreement.

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by the law, we shall construe the initial period of the certification as beginning the date the Respondent begins to bargain in good faith with the Union. *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962); *Lamar Hotel*, 140 NLRB 226, 229 (1962), *enfd.* 328 F.2d 600 (5th Cir. 1964), *cert. denied* 379 U.S. 817 (1964); *Burnett Construction Co.*, 149 NLRB 1419, 1421 (1964), *enfd.* 350 F.2d 57 (10th Cir. 1965).

ORDER

The National Labor Relations Board orders that the Respondent, University Park Living Center, Muskegon, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with Local 79, Service Employees International Union, AFL-CIO as the exclusive bargaining representative of the employees in the bargaining unit.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit on terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

and bargain with the Union. It is clear from both the Respondent's answer and its response to the General Counsel's motion that the Respondent is in fact refusing to recognize and bargain with the Union in order to test the certification and that this refusal is based solely on its contention that it is under no legal obligation to bargain with the Union because the certification is invalid. Further, in light of the Respondent's May 19, 1999 letter, any subsequent bargaining request by the Union would be futile. *Fairleigh Dickinson University*, 253 NLRB 1049, 1050 (1981), *enfd.* 732 F.2d 146 (3d Cir. 1984).

All full-time and regular part-time unit managers employed by the Employer at its facility located at 570 South Harvey Street, Muskegon, Michigan; but excluding medical records secretary, central supply purchaser, staff development, clinical resource manager, aging service referral coordinator, clinical care coordinators, service and maintenance employees, guards and supervisors as defined in the Act.

(b) Within 14 days after service by the Region, post at its facility in Muskegon, Michigan, copies of the attached notice marked "Appendix."³ Copies of the notice, on forms provided by the Regional Director for Region 7 after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 19, 1999.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

MEMBER BRAME, dissenting.

In the underlying representation proceeding, I dissented from my colleagues' denial of the Employer's request for review of the Regional Director's decision in which he found that the Employer's registered nurses and licensed practical nurses (unit managers) were not supervisors within the meaning of the Act. Accordingly, I dissent from my colleagues' granting the General Counsel's Motion for Summary Judgment and their finding that the Employer violated Section 8(a)(5) and (1) of the Act in this certification-testing proceeding.

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

³ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

WE WILL NOT refuse to bargain with Local 79, Service Employees International Union, AFL-CIO as the exclusive representative of the employees in the bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit:

All full-time and regular part-time unit managers employed by us at our facility located at 570 South Harvey Street, Muskegon, Michigan; but excluding medical records secretary, central supply purchaser, staff development, clinical resource manager, aging service referral coordinator, clinical care coordinators, service and maintenance employees, guards and supervisors as defined in the Act.

UNIVERSITY PARK LIVING CENTER